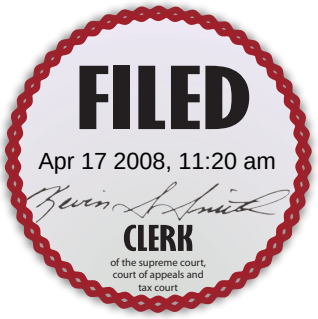

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IN THE
COURT OF APPEALS OF INDIANA

MARCEL EDMOND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0709-CR-519
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas Stefaniak, Jr., Judge
Cause No. 45G04-0612-FD-143

April 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Marcel Edmond appeals his sentence after his conviction for Causing Serious Bodily Injury when Operating a Motor Vehicle while Intoxicated, as a Class D felony, following a guilty plea. Edmond raises a single issue for our review, namely, whether his trial counsel rendered ineffective assistance in not raising purported mitigators during Edmond's sentencing hearing.

We affirm.

FACTS AND PROCEDURAL HISTORY

On November 13, 2006, Edmond's vehicle ran a red light in Lake County and struck the vehicle of Christopher Garman. Edmond's blood alcohol level at the time far exceeded the legal limit. Garman's pregnant fiancé, Tikia Perez, was a passenger in Garman's vehicle. The collision shattered her hip and burst her placenta. Tikia was rushed to a nearby hospital, where doctors performed an emergency C-section. While Tikia's child was born healthy, Tikia now has daily pain and is unable to work.

On December 8, the State charged Edmond with four counts, two felonies and a misdemeanor relating to the operation of a motor vehicle while intoxicated and a misdemeanor charge for driving with a suspended license. On June 28, 2007, Edmond pleaded guilty to the charge of causing serious bodily injury when operating a motor vehicle while intoxicated, as a Class D felony. In exchange, the State dismissed the remaining charges. Pursuant to the plea agreement, sentencing was left to the trial court's discretion.

The court held a sentencing hearing on August 9. At that hearing, Edmond's trial counsel argued that Edmond's sentence should be mitigated. In particular, Edmond's counsel noted that Edmond's criminal history was a result of his being "a life-long substance abuser." Transcript at 7. Edmond's counsel also argued that Edmond had "accepted responsibility," most notably by pleading guilty. Id. at 8. Finally, Edmond's counsel requested the trial court "to sentence [Edmond] to time served and then allow him to face a larger sentence that he may receive" in another cause for a probation violation. Id.

After his trial counsel presented argument, Edmond exercised his right of allocution. In doing so, Edmond stating the following:

> Your Honor, I'm very hurt and apologetic for any pain I've caused anyone. I have lost my apartment, and my job is on the line pending this outcome. I have a 15-year-old daughter going to the tenth grade that's an honor student at Merrillville High School that also plans on attending college and needs my support.
>
> All I'm asking for is a chance to prove to you and myself that you will never see my face again. I do not know if this means anything to you or the prosecution, but I did complete and have my certificate in chemical dependencies while I was here. And what I've learned from this whole situation is that alcohol is worse than any drug because it's legal. Thank you.

Id. at 9.

The trial court found as aggravating circumstances Edmond's criminal history and his "need of correctional and rehabilitative treatment that can best be provided by . . . commitment to a penal facility." Id. at 21. Regarding Edmond's criminal history specifically, the court noted his convictions for the following: a 1988 conviction for operating while intoxicated; a 1993 misdemeanor conviction for operating a vehicle

while intoxicated; a 1997 misdemeanor conviction for operating while intoxicated; a 1998 conviction for operating a vehicle while intoxicated with a prior conviction within five years; a 1998 conviction for possession of marijuana; convictions in 1999 for dealing in cocaine, as a Class B felony, and "driving while habitual traffic offender," a Class A misdemeanor, id. at 20; and a 2004 conviction for driving while suspended. The court also noted that while Edmond was on bond for the instant offense he allegedly operated a vehicle while intoxicated causing endangerment.

In mitigation, the court identified only Edmond's guilty plea. The court then found that "the aggravating factors substantially outweigh the mitigating factors." Id. The court sentenced Edmond to thirty-six months in the Department of Correction. This appeal ensued.

DISCUSSION AND DECISION

Edmond argues that his trial counsel rendered ineffective assistance by not arguing the following circumstances as mitigators during the sentencing hearing: Edmond's remorse, the hardship his incarceration would have on his daughter, and his completion of a chemical dependency class. A claim of ineffective assistance of counsel must satisfy two components. Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Id. at 687-88. Second, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine

confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Edmond cannot demonstrate that his trial counsel's representation fell below an objective standard of reasonableness. Again, in his statement of allocution, Edmond expressed his remorse, he informed the court of the hardship his incarceration would have on his daughter, and he noted that he had completed a chemical dependency class. Although not made by Edmond's counsel, that statement was "in the nature of [a] closing argument." See Biddinger v. State, 868 N.E.2d 407, 413 (Ind. 2007). And as our Supreme Court recently stated:

> [T]he purpose of the right of allocution is to give the trial court the opportunity to consider the facts and circumstances relevant to the sentencing of the defendant in the case before it. When the defendant is given the opportunity to explain his or her views of the facts and circumstances, the purpose of the right of allocution has been accomplished.

Id. (citation and quotation omitted). Thus, the mitigators now proposed by Edmond were in fact raised before the trial court. Accordingly, Edmond's counsel could not have acted in an objectively unreasonable manner.

Further, Edmond cannot demonstrate that, had his counsel incorporated the proposed mitigators in a separate closing argument, the result of the sentencing proceeding would have been different. Indeed, despite having heard Edmond's statement of allocution, the court did not find the issues raised by Edmond significant. See, e.g., Anglemyer v. State, 868 N.E.2d 482, 490 (noting that a trial court need only identify significant mitigators when sentencing a defendant), clarified in part on other grounds, 875 N.E.2d 218 (Ind. 2007). Rather, in light of Edmond's lengthy criminal history and

need for rehabilitative treatment, the court found that the aggravating circumstances "substantially outweigh[ed]" the only significant mitigator, Edmond's guilty plea. Transcript at 21. Thus, it is highly unlikely that court would have weighed the aggravators and mitigators differently had Edmond's counsel reiterated Edmond's proposed mitigators.

We cannot say either that Edmond's representation at trial fell below an objective standard of reasonableness or that Edmond was prejudiced by his counsel's conduct. See Strickland, 466 U.S. at 687-88, 694. As such, Edmond did not receive ineffective assistance of trial counsel, and we must affirm his sentence.

Affirmed.

SHARPNACK, J., and DARDEN, J., concur.